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Via Electronic Mail

Judith.Harvey@usdoj.gov

January 14, 2015

Judy Harvey, Attorney
U.S. Department of Justice
Environment and Natural Resource Division
Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044-7415

Re: *California River Watch v. City of Eureka.*
USDC Case No.: 3:14-cv-01253 RS

Dear Attorney Harvey:

In compliance with 33 U.S.C. § 1365(c)(3), we enclose for agency review by the Department of Justice a copy of the Settlement Agreement and Release entered into by the parties in resolution of the above-captioned matter.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Jerry Bernhaut".

Jerry Bernhaut

JB:lhm

Enclosure

cc: Cyndy Day-Wilson
City Attorney
531 K Street
Eureka, CA 95501-1165

**SETTLEMENT AGREEMENT AND RELEASE
BETWEEN CALIFORNIA RIVER WATCH AND
THE CITY OF EUREKA**

This Settlement Agreement is made and entered on January 9, 2015 ("Effective Date"), by and between California River Watch, a non-profit corporation on behalf of itself and its members ("River Watch") and the City of Eureka, a municipal corporation ("City"). The City and River Watch will hereinafter be referred to collectively as the "Parties."

RECITALS

WHEREAS, River Watch is a 501(c)(3) nonprofit, public benefit corporation organized under the laws of the State of California, dedicated to the protection, enhancement, and restoration of the rivers, creeks, and tributaries of California;

WHEREAS, Eureka owns and operates the Elk River Wastewater Treatment Facility and associated collection system, for the purpose of collecting, treating and disposing of wastewater from residential, commercial, and industrial sources within the City of Eureka;

WHEREAS, on or about June 28, 2013 River Watch served Eureka with a Notice of Violations and Intent to File Suit under the Clean Water Act, CWA §505, 33 U.S.C. § 1365, ("CWA Notice");

WHEREAS on or about March 18, 2014, River Watch served Eureka with a Complaint under the Clean Water Act, CWA §505, 33 U.S.C. § 1365, in the United States District Court, Northern District of California, Case No. 3:14-cv-01253 RS ("CWA Complaint");

WHEREAS on September 22, 2014, River Watch and Eureka engaged in mediation supervised by court appointed mediator Gerald George, wherein tentative agreement was reached on terms of a Settlement Agreement;

WHEREAS, River Watch and Eureka, through their authorized representatives, and without either adjudication of River Watch's claims or admission by Eureka of any alleged violation or other wrongdoing, have chosen to resolve in full River Watch's allegations as set forth in the CWA Notice through settlement, and avoid the cost and uncertainties of further litigation; and,

WHEREAS, River Watch and Eureka have agreed that it is in their mutual interest to enter into this Agreement setting forth the terms and conditions appropriate to resolving River Watch's allegations set forth in the CWA Notice.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is acknowledged, the Parties agree as follows:

AGREEMENT

1. Remedial Measures.

A. Sewer Investigation and Repair.

1. The City agrees to assess all of the sewer collection lines which it owns and operates within the next three (3) years from the Effective Date within 200 feet of surface waters, utilizing either or both of its current closed circuit television (CCTV) scan, or any other new scanning technology which it may acquire. This provision shall not apply to those sewer collection lines that have been assessed within ten (10) years prior to execution date of this Agreement.

The City agrees to assign to each sewer line segment a rating consistent with the Pipeline Assessment and Certification Program ("PACP") rating system, developed by the National Association of Sewer Service Companies, which assigns grades as follows:

- 5 -Failed or will fail within 5 years
- 4 -Failure likely in 5-10 years
- 3 -May fail in 10-20 years
- 2 -Unlikely to fail for at least 20 years
- 1 -Unlikely to fail in foreseeable future

Any sewer line segment with a rating of 5 shall be repaired, rehabilitated or replaced by the City within two years of the determination.

2. The City agrees to assess all of the sewer collection lines which it owns or operates that are not within 200 feet of surface waters within ten (10) years. This provision shall not apply to those sewer collection lines that have been assessed within ten (10) years prior to execution date of this Agreement.

3. Eureka's obligations to comply with section 1.a. above shall be deferred if an extreme decline in revenues presenting a credible threat of bankruptcy would make compliance with section 1.a. unfeasible, subject to the notice and dispute resolution terms of this Agreement. Where implementation of the actions set forth in section 1.a. within the deadlines prescribed becomes unachievable based on an extreme decline in revenues, Eureka shall notify River Watch in writing within thirty (30) days of the date that Eureka knew of the extreme decline in revenues, and shall describe the reasons for and conditions qualifying as extreme decline in revenues. The Parties agree to meet and confer in good faith concerning the deferred performance and, where the Parties concur that timely performance was or is unachievable, despite the timely good faith efforts of Eureka, compliance shall be deferred and new performance deadlines shall be established by agreement of the Parties. In the event that the Parties cannot timely agree, either party shall have the right to invoke the dispute resolution procedure described herein.

2. Sewer Lateral Ordinance.

The City agrees to consider a sewer lateral ordinance within one (1) year of the final execution of this Agreement. The City shall be solely responsible for the substance of the Ordinance presented to the City Council for consideration. River Watch will be provided a copy of the proposed Ordinance and may review and provide comments.

3. Attorneys' Fees.

The City shall pay River Watch the sum of \$45,000 (Forty-Five Thousand Dollars) as full reimbursement for River Watch's investigative and attorney's fees and costs within five (5) days of the filing by River Watch with the federal District Court of a Stipulation for Dismissal whereby the Complaint and all claims therein shall be dismissed with prejudice. Payment shall be made by way of a single check payable to "California River Watch" and shall constitute full and complete satisfaction of any and all claims by River Watch for attorney's fees and costs in connection with this matter up to and including the Effective Date, as well as attorney's fees and costs incurred by River Watch to monitor and enforce City's compliance with this Agreement, with the exception of fees and costs incurred by enforcing this Agreement in court, in which the Court would have discretion to award any prevailing party attorneys' fees.

4. DOJ Approval and Dismissal.

4.1 Within five (5) business days after the Effective Date of this Agreement, River Watch shall provide the Federal District Court for the Northern District of California in Case No. 3:14-cv-01253 RS with a Notice of Settlement, and shall submit this Agreement to the United States Department of Justice ("DOJ") for the statutory 45-day agency review period set forth in 33 U.S.C. §1365(c).

4.2 Within five (5) business days after the expiration of the agency review period discussed in Section 4.1, River Watch shall file with the federal District Court a Stipulation for Dismissal whereby the Complaint and all claims therein shall be dismissed with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii).

5. Supplemental Environmental Program.

The City will install monitoring manhole covers at locations of its choosing within six (6) months from the Effective Date of this Agreement. The City will dedicate fifteen thousand dollars (\$15,000) to this project, the funds to be allocated between installation and maintenance of the manhole covers at the City's discretion.

The City will provide River Watch with the details of the project for River Watch's review and comment at least two (2) weeks prior to formally allocating the funds in its budget. The City shall have no duty to respond to or follow the comments received from River Watch.

6. Release.

Upon the Effective Date, River Watch, on behalf of itself, its officers, members, agents, successors and assigns, and any other person acting under its direction and control with respect to this matter (including but not limited to Northern California River Watch), agrees that it releases, quits and forever discharges the City, its elected and appointed officials, its City Council, officers, employees, agents, attorneys, legal successors and assigns, and any other person acting on the City's behalf, from all claims, actions, causes of action, obligations, except for obligations under this Agreement, liabilities, indebtedness, breach of duty, claims for injunctive relief and/or equitable relief, suits, liens, damages, losses, costs or expenses, including attorney's fees, known or unknown, fixed or contingent, liquidated or unliquidated, suspected or unsuspected, foreseen or unforeseen, based upon the violations alleged, or which could have been alleged in the Notice, including without limitation any and all claims for violations of the Clean Water Act which occurred at any time up to the Effective Date.

7. Section 1542 Waiver.

River Watch agrees that the releases set forth in this Settlement Agreement extend to unknown as well as known claims. River Watch hereby waives the benefits of section 1542 of the California Civil Code, which provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release which if known by him must have materially affected the settlement with debtor."

8. Covenant Not to Sue.

In further consideration of the City's agreement to enter into this Settlement Agreement, River Watch, on behalf of itself, its officers, members, agents, successors and assigns, and any other person acting under its direction and control with respect to this matter (including but not limited to Northern California River Watch), covenants and agrees not to sue or take any other step to enforce any claims, rights, liabilities or causes of action released by the Settlement Agreement. Furthermore, River Watch, on behalf of itself, its officers, members, agents, successors and assigns, and any other person acting under its direction and control with respect to this matter (including but not limited to Northern California River Watch) agrees and covenants that for a period of 5 (five) years from the Effective Date, it will not file any lawsuits against the City seeking relief for alleged violations of the Clean Water Act nor will River Watch initiate or support such lawsuits

against the City brought by other groups or individuals by providing financial assistance, personnel time, or any other affirmative action. River Watch understands and agrees that its sole remedy against the City during this seven year period shall be to enforce the Settlement Agreement. River Watch further covenants and agrees that, at least 60 (sixty) days before filing any action seeking to enforce the Settlement Agreement, it shall notify the City in writing of what actions or inactions by the City it deems to be in violation of the Settlement Agreement. Thereafter, the Parties shall meet and confer in a good faith attempt to resolve their disputes. If the Parties cannot informally resolve the dispute, they will make a good faith effort to mediate the dispute prior to the filing of any action to enforce the Settlement Agreement. This section shall not bar River Watch from filing a lawsuit related to new discharges that it contends are not authorized by any new NPDES Permit issued to the City for its treatment plant by the Regional Board subsequent to the execution of this Agreement.

9. Agreement as Defense.

This Settlement Agreement may be pleaded as a full and complete defense to, and may be used as the basis for any injunction against, any action, suit or other proceedings which may be instituted, prosecuted or attempted in breach of the Settlement Agreement, whether by the Parties hereto or any of River Watch's members, successors or assigns.

10. Force Majeure.

- A. Separate from, and in addition to any other limitations on the City's obligations under this Agreement, the City's obligation to comply with one or more of the provisions of this Agreement shall be deferred to the extent and for the duration that the delay in compliance is caused by an event or circumstance beyond the reasonable control of the City or any entity controlled by the city, including its contractors, and that could not have been reasonably foreseen and prevented by the exercise of due diligence by the City. Delays beyond the control of the City may include, but are not limited to, delays caused by the action or inaction of state, regional, federal or other permitting authorities and regulatory agencies. Delays solely caused by unanticipated or increased costs or expenses associated with the completion of any work or activity under this Agreement, changed financial circumstances, or the City's failure to make timely and bona fide applications and to exercise diligent efforts to obtain permits or normal inclement weather shall not, in any event, be considered to be circumstances beyond the City's control.
- B. If any event or circumstance occurs that causes or may cause a delay in the City's compliance with any provision of this Agreement, and the City seeks relief under this section of the Agreement, the City shall:
 - 1. Provide written notice to River Watch within thirty (30) days for the date that the City first knows of the event or circumstance, or should have known of the event or circumstance by the exercise of due diligence. The City's notice to

River Watch shall specifically refer to this part of this Agreement and describe the anticipated length of time the delay may persist, the cause or causes of the delay, the measures taken or to be taken by the City to prevent or minimize the delay, the schedule by which the measures will be implemented, and the anticipated date of compliance.

2. The City shall adopt all reasonable measures to avoid and minimize such delays.

3. If River Watch disagrees with the City's notice, the Parties shall meet and confer in good faith to determine whether the Parties concur that the delay was or is impossible to avoid, despite the good faith efforts of the City.

4. If the Parties cannot agree then the Parties shall mediate the dispute before Mediator Gerald George. Expenses shall be split between the Parties.

11. Entire Agreement.

This Agreement constitutes the entire agreement between the Parties. It is expressly understood and agreed that this Settlement Agreement may not be altered, amended, modified or otherwise changed in any respect whatsoever except by a writing duly executed by authorized representatives of the Parties hereto. The Parties hereby agree and acknowledge that they will make no claim at any time or place that this Agreement has been orally altered or modified or otherwise changed by oral communication of any kind or character. This Agreement shall supersede all prior previous agreements whether written or oral that may have been reached between the Parties in connection with this matter, and provides the sole remedy for any party to any other party regarding this matter.

12. Voluntary.

This Agreement is entered into by each party freely and voluntarily. Each of the Parties has had the benefit of advice of counsel of their choice in the negotiating, drafting and execution of this Agreement, and the language and all parts of this Agreement is the product of the efforts of all counsel. Accordingly, neither the entire Agreement nor any provision in it shall be deemed to have been proposed or drafted by a party or construed against any party.

13. Governing Law.

This Agreement shall be governed, interpreted, construed and enforced in accordance with the laws of the State of California. Should any provision of this Agreement be held invalid or illegal, such illegality shall not invalidate the whole of this Agreement, but rather, this Agreement shall be construed as if it did not contain the illegal part, and the rights and obligations of the Parties shall be construed and enforced accordingly.

14. Authority to Execute.

Each party respectively represents and warrants to each other party that the undersigned representative for each party has full and complete authority to execute this Agreement and bind said party to the terms hereof.

15. Counterparts.

This Agreement may be signed in counterparts for the Parties hereto and shall be valid and binding on each party as if fully executed all in one copy.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed on its behalf by its duly authorized officers, and has executed this Agreement, the day and year first above written.

CALIFORNIA RIVER WATCH

By: _____
Larry Hanson, President

APPROVED AS TO FORM:

By: _____
Jerry Bernhaut
Attorney for California River Watch

CITY OF EUREKA

By: _____
Greg Sparks, City Manager

APPROVED AS TO FORM:

By: _____
Cyndy Day-Wilson, City Attorney

ATTEST:

By: _____
Pam Powell, City Clerk

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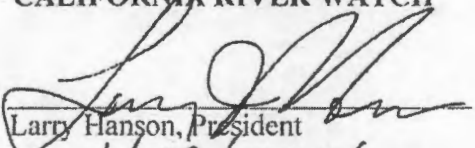
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CALIFORNIA RIVER WATCH

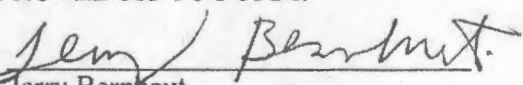
By:


Larry Hanson, President

11/09/2014

APPROVED AS TO FORM:

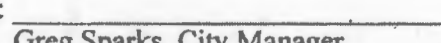
By:


Jerry Bernhaut

Attorney for California River Watch

CITY OF EUREKA

By:


Greg Sparks, City Manager

APPROVED AS TO FORM:

By:


Cyndy Day-Wilson, City Attorney

ATTEST:

By:


Pam Powell, City Clerk